Supreme Court, U.S.
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No. 93-376

In the

Supreme Court of the United States

October Term, 1993

KEY TRONIC CORPORATION,
Petitioners,
v.
UNITED STATES, ET AL.,
Respondents.

ON A WRIT OF CERTIORARI TO
THE COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Petition for Writ Of Certiorari Filed September 3, 1993
Certiorari Granted December 13, 1993

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Opinion of the United States District Court for the Eastern District of Washington, dated March 19, 1991, as amended August 12, 1991 B-1

Opinion of the United States Court of Appeals for the Ninth Circuit, dated January 28, 1993 A-1

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RELEVANT DISTRICT COURT DOCKET ENTRIES—KEY TRONIC CORPORATION v. UNITED STATES, ET AL., NO. 89-CV-694 (E.D. Wa.)

Docket No.	*Description*
1.	COMPLAINT (Summons(es) issued) (sw)[Entry date 10/17/89]
9.	ANSWER by defendant USA, defendant USAF (dg) [Entry date 12/21/89]
22.	MOTION by USA to dismiss (lm)
44.	Statement of material facts by plaintiff Key Tronic Corp in support of Key Tronic's Opposition to Defendant Schmidt's Motion for Summary Judgment
67.	ORDER Re: Motions for Summary Judgment, Inter Alia by Chief Judge Justin L. Quackenbush (pltf's Second, Third & Fourth Claims for Relief are DISMISSED WITH PREJUDICE against defts U.S., the Air Force and Rice; the First Claim for Relief is DISMISSED WITH PREJUDICE against these defts w/respect to any costs or obligation incurred by pltf pursuant to the Consent Decree entered in DOE and EPA v. County of Spokane And Key Tronic Corp., C-89-033-RJM; these defts motion to dismiss the First Claim for Relief is DENIED w/ respect to pltf's action to recover private response costs under 42 U.S.C. 9607; the Complaint and all Claims therein against deft William Schmidt are DISMISSED WITH PREJUDICE; Key Tronic's motion for partial summary judgment is GRANTED IN PART and DENIED IN PART; the Court grants summary judgment establishing the liability of the Air Force under 42 U.S.C. 9607; in all other respects, Key Tronic's

motion for partial summary judgment is denied; Key Tronic's motion to compel discovery from the Air Force is granted; the Air Force's motion for a protective order is DENIED) (cc: all counsel) COB-101-10 (lm)

92. CONSENT DECREE by Chief Judge Justin L. Quackenbush (resolving USA's liability to Key Tronic for certain claims; USA shall pay to Key Tronic $185,000.00; see decree for other claims still disputed) (cc: all counsel) COB-103-78 (sw)

94. MOTION by plaintiff Key Tronic Corp for partial summary judgment that response costs are recoverable (sw)

115. USA's opposition to motion for partial summary judgment that response costs are recoverable and supplemental motion to dismiss (sw)

125. ORDER re: Pltf's Motions for Summary Judgment by Chief Judge Justin L. Quackenbush (denying motion to stay as moot [113-1]; granting motion for enlargement of time [107-1]; denying as moot motion for partial summary judgment that Alumax is a "covered person" [103-1]; denying as moot motion for partial summary judgment re contribution claim against Alumax [99-1]; granting motion for partial summary judgment that response costs are recoverable [94-1]: Case mgmt ddl set 4/18/91 parties to submit stipulation as to damages within 30 days of entry of this order) 9cc: all counsel) (sw)

134. Stipulation (lm)

137. ORDER of Final Judgment by Chief Judge Justin L. Quackenbush (granting motion for entry of final judgment [135-1]; the Clerk of the Court is directed to enter a judgment against the United States, the United States Air Force and Donald B. Rice in favor of Key Tronic in the amount of $155,500.00) (cc: all counsel) COB-106-23 (lm)

138. JUDGMENT (cc: all counsel) COB-106-24 (lm)

140. NOTICE OF APPEAL by defendant Donald B. Rice, defendant USAF, defendant USA from Dist. Court decision [137-1] (cc: all counsel and 9CCA) (lan) [Entry date 09/10/91]

146. Mandate [CCA: 91-36021] from 9CCA (It is now here Ordered & adjudged by this Crt, that the judgment of the said District court in this cause be and hereby is REVERSED;) [140-1] (cc: all counsel) (vr)

RELEVANT CIRCUIT COURT DOCKET ENTRIES—KEY TRONIC CORPORATION v. UNITED STATES, ET AL, NINTH CIRCUIT NO. 91-36021

Docketing Date	*Description*
9/24/91	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement, setting schedule as follows: CADS due 10/8/91 for Eileen T. McDonough; appellant's designation of RT is due 9/9/91,,; appellee's designation of RT is due 9/18/91; appellant shall order transcript by 9/30/91,,; court reporter shall file transcript in DC by 10/29/91; certificate of record shall be filed by 11/5/91; appellant's opening brief is due 12/16/91,,; appellees' brief is due 1/14/92; appellants' reply brief is due 1/28/92,,; [91-36021] (rv)
10/1/92	CALENDARED: San Francisco 11/2/92 1:30 p.m. Courtroom 2 [91-36021] (dd)
10/13/92	Filed, as of 1/13/92, certified record on appeal in 10 Vols. (total); 10 Clerks Rec, 0 RTs (ORIGINAL) [91-36021] [91-36021] (mag)
11/2/92	ARGUED AND SUBMITTED TO Joseph T. SNEED, Arthur L. ALARCON, William C. CANBY [91-36021] (ch)

1/28/93	FILE OPINION: REVERSED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Joseph T. SNEED; Arthur L. ALARCON, author; William C. CANBY, dissenting.) FILED AND ENTERED JUDGMENT. [91-36021] (ck)
2/11/93	Filed original and 40 copies Appellee Key Tronic Corp petition for rehearing with suggestion for rehearing banc 8 p. pages, served on 2/10/93 (PANEL AND ALL ACTIVE JUDGES) [91-36021] (sf)
6/7/93	Filed order (Joseph T. SNEED, Arthur L. ALARCON, William C. CANBY,): The petition for rhrg is denied & the suggestion for en banc rhrg is rejected. [91-36021] (mhf)
6/15/93	MANDATE ISSUED [91-36021] (sf)
9/17/93	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 93-376 filed on 9/7/93. [91-36021] (sf)
12/20/93	Filed Supreme Court order (SC Date: 12/13/93) granting certiorari petition to (PANEL). [2429836-1] [91-36021] (jr)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
WASHINGTON

KEY TRONIC CORPORATION, a Washington corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA; THE UNITED STATES AIR FORCE; DONALD B. RICE, THE SECRETARY OF THE UNITED STATES AIR FORCE, in his individual capacity; ALUMAX, INC., a Delaware corporation; ALUMAX FABRICATED PRODUCTS, INC., a Delaware corporation; and WILLIAM SCHMIDT, an individual,

Defendants.

NO. C-89-694-JLQ

AFFIDAVIT OF DAVID L. POWERS

STATE OF WASHINGTON)
) ss.
COUNTY OF SPOKANE)

DAVID L. POWERS, being first duly sworn, upon oath, deposes and says:

1. I am the Vice President, General Counsel and Secretary of Key Tronic Corporation. I have held that position since July 19, 1988. From August 5, 1987 until July 18, 1988, I held the position of General Counsel and Secretary. Prior to that time, I held the position of Acting

General Counsel and Assistant Secretary. I have been responsible for implementing and supervising the potentially responsible party ("PRP") search regarding the Colbert Landfill and negotiating the consent decree.

2. Key Tronic acknowledged that it had taken waste solvents and other waste chemicals to Colbert Landfill whenever asked about that issue by county or state officials over the years. A good example is the survey conducted by Damon Taam of the county in early 1980, the results of which are set forth in the letter of June 4, 1980, attached as Exhibit A to this affidavit. However, other entities that landfilled chemicals at Colbert Landfill were not, and have not been, as forthcoming. When it became clear in 1986 that potential Superfund liability for cleaning up the landfill and groundwater contaminated by it would be extraordinarily expensive, Key Tronic began an effort to identify other entities that contributed to the problem.

3. With the assistance of the Popham Haik law firm from Minneapolis, local counsel, Goss, Moe & Sampson, and A&A Properties, an investigation of potentially responsible parties was begun in ____ of 1986. This involved undertaking numerous witness interviews, filing contribution lawsuits against various entities believed to have landfilled chemical wastes at Colbert, and conducting discovery to determine the extent of responsibility of these entities. The PRP investigative costs associated with these activities during 1986 and 1987 were $121,589.36 for Popham Haik and $9,464.52 for Goss, Moe & Sampson. These costs are summarized on Exhibit B. Key Tronic does not seek, in this motion, to recover the fees paid to A&A Properties.

4. In late 1986 I was promoted to the position of Acting General Counsel and Assistant Secretary for Key Tronic. Thereafter, I made the decision to employ the Perkins Coie law firm and new local counsel, MacGillivray & Jones, to continue the PRP investigative effort. After familiarizing themselves with the evidence already gathered, and

conducting additional witness interviews, the investigation was narrowed to several PRPs, including Fairchild Air Force Base, Alumax and its predecessor companies, William Schmidt, and several additional private entities (United Paint, which was in bankruptcy, Husky Oil, and Williams Trucking). The investigation continued via both the discovery process in the pending state and federal landowner contribution cases (depositions and document production from the Air Force and Alumax) and witness interviews conducted by Perkins Coie lawyers and Robert Bailor, a private investigator.

5. The PRP investigative fees and costs associated with the Perkins Coie effort are estimated to have been $62,492.18. These were estimated by Perkins Coie based upon a breakout of PRP investigation fees and expenses from other fees and expenses relating solely to other matters. The fees and expenses for Robert Bailor were $2,462.21. These costs are summarized on Exhibit B. Key Tronic does not seek, in this motion, to receive fees paid to McGillivray & Jones.

6. In 1988, the information developed through this investigation was shared with US EPA. As a result, EPA issued Superfund notice letters to the Air Force and Alumax—something it had declined to do prior to 1988.

7. During 1987 and 1988, Perkins Coie was also retained to represent Key Tronic in negotiating a settlement of the potential Colbert Superfund cleanup case anticipated to be brought by EPA and DOE to accomplish a final remedial action at the site. Assisting in that effort on technical issues were, first, the engineering firm of Dames and Moore, and later the firm of Landau Associates, Inc. Landau Associates, Inc. reviewed the reports of EPA and DOE, conducted independent analyses, evaluated the efficiency of the proposed remedy, and met with EPA and DOE officials. The negotiation process culminated in the Consent Decree executed in 1988, by EPA, DOE, Key

Tronic, and Spokane County. The Air Force participated in those discussions but concluded its settlement with EPA in a separate Interagency Agreement finalized in February 1990.

8. The fees and expenses associated with the Perkins Coie effort with respect to settlement of the case with EPA and DOE are estimated to have been $160,641.23. These were estimated by Perkins Coie based upon a breakout of settlement-related fees and expenses from other fees and expenses relating solely to other matters. The fees and expenses for Dames and Moore amounted to $22,323.09. The fees and expenses for Landau Associates amounted to $126,270.53. These costs are summarized on Exhibit B.

9. Key Tronic has paid $1.3 million to date pursuant to the Consent Decree. Key Tronic is obligated to pay a total of $4.2 million under the Consent Decree.

10. As the company executive supervising the PRP search and negotiation of the Consent Decree I spent approximately 70% of my professional time from the fall of 1986 to July 1988 and 40% of my professional time from July 1988 to February 1989 on these and related matters. My salary in the fall of 1986 was $2710.00 per month. Change of salary:

1/11/87	- $2940.00 per mo.
4/16/87	- $3195.00 per mo.
7/12/87	- $3465.00 per mo.
10/18/87	- $3810.00 per mo.
1/10/88	- $4377.00 per mo.
4/03/88	- $4814.70 per mo.
6/26/88	- $5296.17 per mo.

11. All of the above-referenced costs are summarized on Exhibit B. The underlying cost records have been maintained and are available for review.

12. All of these costs were paid for by Key Tronic. None of these costs were incurred or paid by the federal government, EPA or USAF.

13. The state, through Carol Thompson, Carol Kraege, Mike Blum, and Fred Gardner of DOE, and federal government, through Neil Thompson of EPA, were advised of Key Tronic's efforts described above.

14. The public was informed of and involved in the response actions undertaken by Key Tronic through various public meetings held in the Colbert community, in Spokane at the Washington State Department of Social and Health Services, in the County Courthouse's Commissioners' public meeting rooms, through the newspaper and TV media, newsletters, and through the regularly scheduled Colbert Cleanup Committee meetings.

15. The response actions described above were cost effective.

16. The defendants were advised of Key Tronic's actions and were asked to participate through legal counsel.

/s/_____
David L. Powers

SUBSCRIBED AND SWORN to before me this ___ day of June, 1990.

Betty A. Traband /s/
NOTARY PUBLIC in and for the State of Washington, residing at Spokane
My Commission Expires: March 15, 1994

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

KEY TRONIC CORPORATION, a Washington corporation, Plaintiff, v. UNITED STATES OF AMERICA; et al., Defendants.	NO. C-89-694-JLQ ORDER RE: MOTIONS FOR SUMMARY JUDGMENT, INTER ALIA

On Friday, July 20, 1990, the Court heard oral argument of the motions discussed below. Kathryn L. Tucker and Mark W. Schneider represented plaintiff Key Tronic Corporation. Eileen McDonough appeared on behalf of the defendants United States, United States Air Force and Donald B. Rice. Dennis Smith was present for defendant William Schmidt, and Leslie C. Nellermoe represented defendants Alumax, Inc. and Alumax Fabricated Products, Inc. This Order sets forth in formal manner the court's oral rulings on the various motions.

I. *Factual Background*:[1]

From 1968 to 1986 Spokane County maintained the Colbert Disposal Site ("Colbert") in Spokane County,

[1] "Facts" set forth as background information are either undisputed or are immaterial to resolution of the various motions before the Court. Where pertinent, the parties' specific factual contentions are discussed below.

Washington. From the early 1970's through 1980, the County contracted to have defendant William Schmidt do the work necessary to construct, improve and complete the landfill. In that capacity, Schmidt accepted and disposed of refuse at Colbert. Key Tronic alleges that between 1975 and 1980, Schmidt accepted liquid chemicals from the United States Air Force ("USAF"); Alumax Fabricated Products, Inc. and Alumax Mill Products, Inc. (hereafter collectively "Alumax"); and Key Tronic Corporation. This Court has previously found that the USAF disposed of hazardous chemicals at Colbert.[2]

In 1980, drinking water wells around Colbert were found to be contaminated by various chemicals, including "TCA." Key Tronic alleges that it incurred, at its own initiative, expenses totaling $1,271,511.10 responding to that discovery.[3]

The Washington Department of Ecology ("DOE") and the United States Environmental Protection Agency ("EPA") also responded to the Colbert situation. These events culminated in the simultaneous entry of a Complaint and Consent Decree in *DOE and EPA v. County of Spokane and*

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[2]*See, Key Tronic v. United States*, C-87-20-JLQ (E.D. Wa.), transcript dated November 7, 1989; Ex. 1 to Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's Motion"), p. 3.

[3]Specifically, Key Tronic alleges that it spent:

1. $115,788.07 investigating the extent and level of contamination;

2. $580,479.99 to provide temporary and then permanent alternative sources of drinking water to residents of the contaminated area;

3. $196,008.27 in order to locate other entities that disposed of hazardous waste at Colbert;

4. $70,000.00 in the opportunity cost of Key Tronic's executive's time; and

5. $309,234.85 on consultation and attorneys' fees to negotiate the Consent Decree and Scope of Work and to comment on the Remedial Investigation and Feasibility Study.

Key Tronic Corp., C-89-033-RJM (E.D. WA), on January 9, 1989. In the Consent Decree, Spokane county agreed to implement and finance a final remedial action plan, which Key Tronic agreed to help fund in the amount of $4.2 million.[4]

Concurrent with the entry of the Consent Decree, the EPA entered an Administrative Order on Consent and Interagency Agreement ("Order/Agreement") with the USAF.[5] The Order/Agreement was issued as an "Expedited Final Settlement" under 42 U.S.C. § 9622, which permits the EPA to enter into an agreement with potential responsible parties ("PRPs") whose proportional contribution to a release of hazardous substances is deemed by the EPA to have been *de minimis* in terms of quantity and relative toxicity. 42 U.S.C. § 9622(g)(1)(A). Under the Order/Agreement, the USAF agreed to pay $1.45 million to the Colbert clean-up fund. In return, the EPA released the USAF from further liability. Additionally, the EPA granted the USAF the "contribution protection" authorized by 42 U.S.C. § 9622(g)(5).

In October 1989 Key Tronic filed the instant action. The Complaint alleges that the USAF, Alumax and Schmidt are liable to Key Tronic for a portion of the costs Key Tronic

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[4]As discussed below, the Consent Decree also provides that "EPA, Spokane County and Key Tronic hereby covenant not to sue each other as to all matters alleged or which could have been alleged in the Complaint with regard to the Site, . . ." The covenant not to sue applies "only to Spokane County and Key Tronic, including its respective divisions, officials, officers, directors, principals, agents, servants, employees, successors, and assigns, and not any parent corporation, subsidiaries and affiliates of the County and Key Tronic." Ex. 17 to Plaintiff's Statement of Facts, pp. 55-56.

[5]See Ex. A. to United States' Motion to Dismiss.

incurred in the Colbert clean-up.[6] Specifically, the Complaint alleges that defendants are liable to Key Tronic under three causes of action:

1. The First Claim for Relief requests damages under 42 U.S.C. § 9607(a)(4)(B), which establishes a private right of action against responsible parties for "any other necessary costs of response incurred by any other person consistent with the national contingency plan";

2. The Second Claim for Relief seeks contribution under 42 U.S.C. § 9613(f)(1), which provides that: "[a]ny person may seek contribution from any other person who is liable or potentially liable under [42 U.S.C. § 9607] during or following any civil action under [42 U.S.C. §§ 9606 or 9607]"; and

3. The Third Claim for Relief seeks contribution under Washington law; RCW 4.22.040 (contribution among parties jointly and severally liable) and RCW 70.105C.040 (joint and several liability among parties liable for a hazardous release).

Finally, the Fourth Claim for Relief seeks a declaratory judgment that defendants are liable for future costs incurred by Key Tronic in responding to the Colbert release.

The Court shall address the parties' various motions in the order in which they were presented.

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[6] As discussed above, Key Tronic alleges that it incurred response costs in two different ways. First, Key Tronic spent $1.2 million in its initial private response to the release. Second, Key Tronic obligated itself to contribute $4.2 million to the clean-up trust fund established by the EPA.

II. *The United States' Motion to Dismiss*

The United States, the USAF, and Rice (hereafter collectively "the USAF") move for dismissal under the "contribution protection" provision of 42 U.S.C. § 622(g)(5).

42 U.S.C. § 622(g)(1) authorizes the EPA to enter *de minimis* settlements with a PRP where the EPA finds both that (1) the amount of hazardous substances contributed to a site by the PRP; and (2) the toxic effects of those substances, are minimal relative to the other hazardous substances at the site. 42 U.S.C. § 622(g)(5) provides: "A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement." The USAF notes that the Order/Agreement includes the required findings, and specifically provides the following contribution protection:

> Subject to the "Reservation of Rights . . . of this Consent Order and Agreement, [EPA] agrees that by entering into and carrying out the terms of this Consent Order and Agreement, the Respondent Air Force will have completely resolved its liability to the United States of America for Covered Matters pursuant to . . . 42 U.S.C. 9622(g)(5), and shall not be liable for claims for contribution for Covered Matters by any other person.

(Order/Agreement, p. 14.)

The Order/Agreement defines "Covered Matters" to "include any and all civil liability for reimbursement of response costs or for injunctive relief pursuant to . . . 42 U.S.C. 9606 or 9607(a), or . . . 42 U.S.C. § 6973, with regard to the Site."

The USAF argues that Key Tronic's claim for contribution under 42 U.S.C. § 9613(f) is expressly prohibited by section 9622(g). Additionally, the USAF argues that Key Tronic's claim for response costs under section 9607 is similarly barred by implication, because the claim is in reality nothing more than an attempt to obtain contribution under a different guise.

In response to the USAF's motion to dismiss, Key Tronic concedes that section 9622(g) prohibits its claim to recover any portion of the $4.2 million Consent Decree obligation, under 42 U.S.C. § 9613(f) (contribution), or 42 U.S.C § 9607(a)(4)(B) (private response cost recovery). Therefore, **Key Tronic's claims against the USAF should be dismissed with prejudice with respect to the $4.2 million Key Tronic must pay pursuant to the Consent Decree**.

With respect to its First Claim for Relief, however, Key Tronic argues that section 9622(g) does *not* bar its direct cause of action against the USAF under 42 U.S.C. § 9607(a)(4)(B), to recover a portion of the $1.2 million Key Tronic spent in its initial private response to the Colbert release. Thus, the issue presented by the USAF's motion is whether the contribution protection provided a settling PRP by 42 U.S.C. § 9622(g)(5) bars a *direct* action by another PRP under 42 U.S.C. § 9607(a)(4)(B) to recover initial response costs privately incurred.

The pertinent language of CERCLA provides some guidance for resolving the issue before the court. Section 9607(a)(4)(B) provides a private right of action to "any other person" who incurs "necessary costs of response" to a release of a hazardous substance. Section 9622(g)(5) provides that a PRP "who has resolved its liability to the United States ... shall not be liable for claims for contribution *regarding matters addressed in the settlement*." (Emphasis supplied.) Thus, to the extent the statutory language is instructive, it does not favor the USAF's motion—section 9622(g)(5)

pertains to "liability to the United States" and to "claims for *contribution*." Key Tronic's action under section 9607(a)(4)(B) is a *direct* action to recover its own response costs—it is not technically a contribution claim, nor does it involve liability to the United States.

The USAF anticipates this quandary, and attempts to meet it by arguing that the contribution protection provided by section 9622 *must* be construed to apply to a PRP's action to recover private response costs under section 9607 in order to effectuate Congress's purpose in empowering the EPA to give contribution protection to *de minimis* PRPs who settle. As stated in SARA, that purpose was "to expedite effective remedial actions and minimize litigation." 42 U.S.C. § 9622(a). The USAF argues that the EPA's "carrot" of contribution protection would be rendered meaningless if other PRPs could avoid it by simply restyling contribution actions as actions to recover "response costs" under section 9607. The USAF cites two cases which it claims support this argument: *United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990), and *Central Ill. Pub. Serv. Co. v. Industrial Oil Tank & Line Cleaning Serv.*, 730 F. Supp. 1498 (W.D. Mo. 1990).

In *Cannons*, the court considered an indemnification cross-claim by several nonsettling PRPs against a group of PRPs that had settled with the EPA and received contribution protection. Granting a motion to dismiss the cross-claim, the court stated:

> [T]he contribution protection provisions serve the important function of encouraging early settlements. Failure to provide similar protection against suits for equitable indemnity would encourage defendants to re-cast their contribution claims as indemnity claims and injure, if not destroy, the goals to

be served by the express contribution protection provisions of CERCLA.

Id. 720 F. Supp. at 1051-52. The First Circuit Court of Appeals affirmed under a similar rationale. 899 F.2d at 92.

Industrial Oil Tank also holds that a nonsettling PRP may not maintain an equitable indemnity claim against a settling PRP who has obtained contribution protection. The court adopted the rationale in *Cannons verbatim*. *Id.* 730 F. Supp. at 1506-07.

Cannons and *Industrial Oil Tank* must be distinguished from the present case. In those cases, nonsettling PRPs sought indemnity from settling PRPs for prospective liability *to the United States*. Thus, the indemnity claims fell squarely within the situation that apparently prompted Congress to pass section 9622. Here, Key Tronic seeks to recover a portion of the costs it incurred *directly*, at its own initiative, in responding to the release at Colbert. That factual distinction makes the rationale in *Cannons* and *Industrial Oil Tank* inapplicable to this case.

The provision in CERCLA that contribution actions cannot be maintained against settlor PRPs "was designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle." *United States v. Cannons Eng'g Corp.*, *supra*, 899 F.2d at 92, *citing* H.R. Rep. No. 99-253, Part I, 90th Cong., 1st sess. 80 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2862. With respect to a contribution claim by one PRP against another PRP for liability *to the EPA*, the effect of contribution protection is not inconsistent with the overall purposes behind CERCLA. Those purposes are (1) to facilitate prompt cleanup of hazardous releases, and (2) to place the ultimate burden of a cleanup upon those responsible for creating the hazard. *See Private Response Cost Recovery Actions Under CERCLA*, 34 Kan. L. Rev. 109, 119 (1985). As to liability to the EPA, contribution protection is

consistent with CERCLA's objectives because all PRPs have the same incentive to promptly settle the EPA's claims against them, and the procedures for EPA settlement tend to insure a proper allocation of responsibility upon the parties. *See generally*, 42 U.S.C. § 9622.

When applied to an action under section 9607(a)-(4)(B) to recover private response costs, however, the effects of contribution protection are not necessarily consistent with CERCLA's primary objectives.

First, if contribution protection is applied to preclude recovery of privately incurred response costs, PRPs will be *discouraged* from taking initiatives to clean up hazardous releases. Instead, PRPs would be encouraged to respond only via EPA settlements, since costs incurred in private response actions may not be even partially recovered against other PRPs who do nothing on their own, yet settle with the EPA and obtain contribution protection.

Second, the application of contribution protection to private response cost actions would work against proper allocation of the clean-up burden. Because liability under CERCLA is joint and several, *see United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1395 (D. N.H. 1985), the EPA might have little incentive to investigate further once it locates one solvent PRP. Application of contribution protection to actions for recovery of private investigation costs will eliminate the incentive 42 U.S.C. § 9607(a)-(4)(B) provides PRPs to identify and locate other PRPs.

The Court also notes that the USAF's argument is founded upon an assumption that may not be valid in the context of this case. The USAF argues that "[i]f Key Tronic could evade the contribution protection provided by [section 9622(g)(5)] simply by styling its claim as a cost recovery action under [section 9607], instead of a contribution action under [section 9613], section [9622(g)-(5)] would be deprived of any practical significance and

hence any utility to EPA." (USAF's Memo., p. 12). Here, the validity of that argument is not self-evident. Even if actions to recover private response costs under section 9607 are permitted, a PRP *still* has an incentive to settle with the EPA under section 9613 or 9622. Settlement with the EPA still offers the advantages of avoiding litigation, fixing liability and precluding contribution *vis a vis* costs incurred *by the EPA*. The facts here are a case in point—the USAF need not worry about a contribution claim by Key Tronic with respect to the $4.2 million EPA-Key Tronic settlement. Alumax and Schmidt, on the other hand, who did not settle, are subject to Key Tronic's contribution claim. Thus, the incentives a PRP has to settle with the EPA under section 9622 are not necessarily "eliminated" by recognition of the private cause of action provided in 42 U.S.C. § 9607(a)(4)(B).

From the above, it is evident that the USAF's argument imputes an effect to section 9622 that runs contrary to the overall purposes of CERCLA. Further, the USAF's position would create an unnecessary inconsistency between the various sections of CERCLA. Both of these results are to be avoided. This court must strive to interpret and apply section 9622 so that it is consistent with the language of CERCLA's other sections and with the purposes of the entire statute considered as a whole. *Adams v. Howerton*, 673 F.2d 1036, 1040-41 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982).

Aside from the analysis above, there is little to assist the court in deciding the issue before it. It has been noted that CERCLA as originally passed by Congress was "an eleventh-hour piece of legislation" drawn in the "final days of a lame-duck session." *Private Response Cost Recovery Actions Under CERCLA*, *supra*, 34 Kan. L. Rev. at 109. "In general, CERCLA's sketchy legislative history limits its interpretative usefulness." *Id.*, pp. 118-19. Nor does the legislative history of SARA (which introduced *de minimis* settlements and contribution protection under section 9622), provide any assistance with regard to the issue before the court. *See*, *Settlement Policy Under the Superfund*

Amendments and Reauthorization Act of 1986, 58 U. Colo. L. Rev. 599 (1988). It appears that the potential interplay between sections 9607 and 9622 was not considered by Congress. *See id.* (discussing legislative history of SARA). However, at the time Congress passed SARA, at least two courts had recognized a private right of action under section 9607(a)(4)(B). *See Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Oh. 1984); *New York v. EXXON Corp.*, 633 F. Supp. 609 (S.D.N.Y. 1986) (action by a PRP). It does not seem reasonable that Congress would intend to eliminate a recognized *direct* cause of action for one class of persons (PRPs) by providing for *contribution* protection in another section that applies to settlement with the EPA.

This last point raises yet another issue. Since the USAF concedes that section 9607 creates a private right of action for recovery of response costs incurred by a PRP, it must also confront the logical conclusion of its position—that by enacting section 9622(g)(5) Congress granted the EPA the administrative power to eliminate a person's right to recover response costs, without even requiring a hearing procedure to which the affected person is a party. The USAF attempts to meet that issue by arguing that the Supreme Court "has established that Congress can foreclose successive litigation by nonparties pursuant to statutory remedial programs." (USAF Memo., p. 15). However, the cases the USAF cites to support this statement are not on point. *Martin v. Wilks*, 109 S. Ct. 2180 (1989), recognizes in *dicta* an *exception* to the "general rule" that a "judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Id.* at 2184. The Court states in a footnote that "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate pre-existing rights if the scheme is otherwise consistent with process." *Id.* n.2. *Martin* cites *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), and *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988), which both involve *nonclaim*

statutes (bankruptcy and estate, respectively). These cases do not suffice to resolve the questions of fairness raised by the USAF's argument. In this regard, the court notes that legislative enactments should never be construed as establishing statutory schemes that are illogical, unjust or capricious. *Bechtel Constr., Inc. v. United Bhd. of Carpenters & Joiners*, 812 F.2d 1220, 1225 (9th Cir. 1987).

I find that 42 U.S.C. § 9622(g)(5) does not bar an action by a PRP under 42 U.S.C. § 9607 (a)(4)(B) to recover *privately* incurred initial response costs from a settlor PRP who has obtained contribution protection from the EPA for the final clean-up costs. The section 9607 action is not one for "contribution" of "liability to the United States." Construction of the statute to permit such action is consistent with the overall purposes of CERCLA and SARA, and avoids internal inconsistencies otherwise drawn into the statutory scheme. Finally, this construction prevents the statute from being applied in an unfair, and potentially unconstitutional, manner. Thus, the USAF's motion to dismiss the First Claim for Relief against it should be denied with respect to the $1.2 million Key Tronic allegedly incurred in initial private response costs.

III. *Key Tronic's State Law Claims Against the USAF*

The USAF contends that Key Tronic's state law claims against it are barred by sovereign immunity. Key Tronic did not dispute that argument in its brief, and conceded the appropriateness of dismissal at oral argument. Therefore, Key Tronic's Third Claim for Relief should be dismissed with prejudice as against the USAF.

IV. *Key Tronic's Claim for Declaratory Relief*

Counsel for Key Tronic stated at oral argument that its Fourth Claim for Relief, for a declaratory judgment under CERCLA, pertained only to Consent Decree payments to be

made in the future. Because Key Tronic has conceded that the USAF is not liable for any further costs incurred under the Consent Decree, the Fourth Claim for Relief should be dismissed with prejudice as against the USAF.

V. *Defendant Schmidt's Motion for Summary Judgment of Dismissal*

From 1971 to 1983, defendant William Schmidt ("Schmidt") contracted with Spokane County to "do all work and furnish all tools, materials and equipment necessary to construct, improve and complete" Colbert. (Exhibit B to Schmidt's Statement of Material Facts, hereafter "the Contract.") Plaintiff alleges that Schmidt's performance of the contract qualifies him as an "operator" of Colbert under CERCLA, as defined in 42 U.S.C. § 9601(20)(A). (Complaint, ¶¶ 8, 14 and 29.) Plaintiff alleges that Schmidt's status as an operator of Colbert subjects him to liability under 42 U.S.C. §§ 9607(a) (response cost recovery) and 9613(f) (contribution), and under Washington law, RCW 4.22.040 (contribution among joint tort feasors) and RCW 70.105D.040 (parties responsible for a release of hazardous substances are jointly and severally liable).

Schmidt seeks summary judgment of dismissal based upon the terms of the Consent Decree between the EPA and the DOE, on the one hand, and Spokane County and Key Tronic, on the other, (*Washington Dept. of Ecology v. Spokane Cy.*, C-89-033-RJM, E.D. WA). The Consent Decree provides:

> Except as specifically provided hereafter, . . . *Spokane County and Key Tronic hereby covenant not to sue each other as to all matters alleged or all matters which could have been alleged in the Complaint with regard to the Site . . . . This covenant not to sue applies only to Spokane County and Key Tronic, including its respective* divisions,

> officials, officers, directors, principals, *agents*, servants, employees, successors, and assigns, and not any parent corporation, subsidiaries and affiliates of the County and Key Tronic."

(Exhibit 1 to Complaint, pp. 55-56.) Schmidt alleges that he operated Colbert as Spokane County's agent, and that plaintiff's claims against him here pertain to matters which were or could have been alleged in the previous complaint. Thus, Schmidt argues that Key Tronic may not maintain this action against him.

Schmidt avers the following facts to establish his agency: The contract specified in great detail the operating instructions for the landfill, including the hours of operation, the manner of refuse disposal, and the required equipment. (Defendant's Statement of Material Facts, 3.) Further, Spokane County employees inspected Colbert up to five times a week to insure that Schmidt complied with the contract's performance specifications. County employees, not Schmidt, had responsibility for determining the type of waste accepted. (*Id.* ¶¶ 5-7.) Also, Schmidt disposed of refuse at Colbert as directed by Spokane County. (*Id.*, ¶¶ 8-10, 16.) Finally, the contract expressly provides that Schmidt operated Colbert subject to Spokane County's control. The contract provides:

> 4. *The maintenance and operations of the disposal site shall be under the control of Spokane County* and all work and methods performed by the contractor pursuant to this agreement shall be subject to inspection, approval and direction of the county engineer or his agents at any time.

(*Id.*, Ex. B, p.4, *citing*, Specifications for Operation of Colbert Disposal Site, § IX. ¶4, p. 6.)

Key Tronic disputes Schmidt's agency claim by an allegation that Spokane County's inspectors "did not have the power to order Mr. Schmidt to take any specific actions, and Mr. Schmidt retained the right to dispute any of the inspector's findings." (Plaintiff's Statement of Material Facts, 7.) That allegation, however, is not supported by Key Tronic's citations to the record, *i.e.*, Contract, Section IX."[7]

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[7]For example, paragraph 1 of Section IX of the contract specifications provides that "[c]ell location, alignment and excavation shall be done in accordance with the direction of the engineer." Paragraph 28 of Section IX provides:

> *If the engineer finds that the contractor has failed to perform properly* any of the provisions of this contract and failed to correct such performances within twenty-four (24) hours after verbal or written notice to the contractor or his designated agents has been notified to do so [*sic*], *the engineer may order the contractor to cease all work at the site and/or may arrange for the necessary work at the site to be done by others and the cost of so doing shall be deducted from payments then due or coming due the contractor*; however, in the case of unauthorized fires, the above action may be ordered if such fires are not extinguished within two (2) hours after verbal notification to do so by the engineer. In the case of insufficient or no daily cover, the engineer need not give the contractor twenty-four (24) hours notice but may arrange for the needed cover of the refuse by others to commence any time after 12 o'clock noon on the day following the improper covering of refuse. *At the engineer's option, a penalty of one hundred dollars ($100) may be deducted from payments due or coming due for each day or part thereof in which any improper performance of the contract is left uncorrected* in excess of 24 hours from the engineer's determination time of such improper performance, except that a fifty dollar ($50) deduction may be made for insufficient or no daily cover. *If the contractor fails to execute the work described in the provisions of Section IX, the engineer may terminate this contract* as provided by Chapter 1-08.10 of the State of Washington Standard Specifications for Road and Bridge Construction of 1969.

Taken as a whole, the contract is clear that Schmidt was to "operate" Colbert at the direction and control of Spokane County.

The parol evidence Key Tronic offers in support of its assertion is similarly unavailing. Key Tronic cites the following deposition testimony of Mike Senske, an engineer for Spokane County, who assisted in drafting the contract. (*See* Senske Depo., p. 18.)

> Q. "You indicated [County landfill inspector] Howard Hay had daily control over landfill operation. What exactly do you mean by 'control'?"
>
> A. If [Hay] saw the contractor had inadequately performed his duties that were required the previous day, he had the authority to tell him you will do this today or you will do that. Obviously, the contractor had the right to tell him, you go right to —— you know."

(Senske Depo., p. 26.) This equivocal testimony does not suffice to create a "genuine"[8] issue of fact as to who controlled the operation of Colbert. That conclusion is buttressed by the fact that this was the *only* evidence Key Tronic could offer on this issue. A quick review of the balance of Senske's deposition reveals the true context of the parties' relationship as one where Schmidt acted subject to Spokane County's control.[9]

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[8]*See, Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986). In *Matsushita*, the Supreme Court stated that when the moving party has carried its burden under Rule 56(c) "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586. "[I]f the factual context renders respondent's claim implausible . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 587.

[9]Senske also testified, *inter alia*, that "the contract specifically required that the contractor at that site was to maintain a hazardous waste disposal area" (p.15); Spokane County decided what substances could be accepted at a particular landfill (p.16); Schmidt "was simply retained as a contract employee" (p.18); one time when Schmidt complained about some "liquid" in drums that was taking paint off his equipment, he was told to accept the material, he had no say in the matter (p.21); and that, with respect to Schmidt's performance of the contract, Spokane County was "more than satisfied. He went the extra mile in all ways." (p.25).

Under Washington law, the undisputed facts establish that Schmidt operated Colbert as Spokane County's agent.[10] "[A]n agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to this control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control." *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1969). *See also Matsumura v. Eilert*, 74 Wn.2d 362, 368, 444 P.2d 806 (1968) (same); *Uni-Com North West v. Argus Publishing*, 47 Wn. App. 787, 796, 737 P.2d 304 (1987) (right of control is the "crucial factor"); *Zoda v. Eckert, Inc.*, 36 Wn. App. 292, 296, 674 P.2d 195 (1983) (right of control is "one of the primary requisites" of an agency).

Key Tronic focuses upon the alleged absence of another indicium of agency—the "power to alter the legal relations between the principal and third persons"—to argue that Schmidt was not an agent of Spokane County. *See, Zoda v. Eckert, Inc.*, 36 Wn. App. at 296. The simple answer to that argument is that Schmidt had such power, and exercised it daily by collecting fees and accepting refuse. (*See* Schmidt Depo. Ex. 2 to Plaintiff's Statement of Facts, p. 3, 16.)

Finally, Key Tronic argues that neither it nor Spokane County intended the covenant not to sue to apply to Schmidt. That argument, however, ignores a basic tenet of contract construction—that the parties' intent must be gleaned first from the terms of the agreement. Only if a contract is ambiguous may extrinsic evidence of intent be considered.

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[10]"The existence of a principal-agent relationship is a question of fact unless the facts are undisputed." *Uni-Com N.W. v. Argus Publishing*, 47 Wn. App. 787, 796, 737 P.2d 304 (1987).

Hastings v. Continental Food Sales, Inc., 60 Wn.2d 820, 823, 376 P.2d 436 (1962); *McCombs Constr., Inc. v. Barnes*, 37 Wn. App. 91, 93, 678 P.2d 837 (1984). The existence of ambiguity is a question of law for the court. *R.A. Hanson Co. v. Aetna Ins. Co.*, 26 Wn. App. 290, 295, 612 P.2d 456 (1980).

Key Tronic's argument would require the court to first find ambiguity in the provision of the Consent Decree releasing Spokane County's "agents." The court may not so find. There is nothing in the Consent Decree to suggest that the parties intended the word "agents" to have any meaning other than that ordinarily given it by Washington law. Absent such an indication, a word's ordinary meaning must be given effect. *Cobray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982).

Under the unambiguous terms of the consent decree, Key Tronic agreed not to sue Spokane County's agents "as to all matters alleged or which could have been alleged in the Complaint with regard to" Colbert. Key Tronic does not argue that its instant claims against Schmidt could not have been alleged in the prior complaint. Because Schmidt was Spokane County's agent with regard to the operation of Colbert, Key Tronic's claims against him may not be maintained. **The Complaint and all Claims therein against defendant William Schmidt should be dismissed with prejudice.**

VI. *Key Tronic's Motion for Partial Summary Judgment*

Key Tronic moves for summary judgment establishing that all defendants are liable under CERCLA. Key Tronic also seeks to establish the amount of each defendant's exposure. In light of the Court's rulings above, only the following issues need be addressed:

A. The USAF

(i) Liability

Key Tronic moves for partial summary judgment that the USAF is liable under 42 U.S.C. § 9607(a)(4)(B) for a portion of the $1.2 million in costs Key Tronic privately incurred in responding to the Colbert release.

This court has previously held that the USAF disposed of hazardous waste at Colbert. (Oral Findings of Fact and Conclusions of Law, *Key Tronic Corp. v. United States*, C-88-041-JLQ and C-87-20-JLQ (E.D. WA, Nov. 3, 1989), p. 2; Ex. 1 to Plaintiff's Statement of Facts.) This fact establishes the USAF as a "person who . . . arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person . . ." 42 U.S.C. § 9607(a)-(3). It is undisputed that Colbert is a "facility" within the definition of 42 U.S.C. § 9601(9), and that a "release" has occurred at Colbert within the definition of 42 U.S.C. § 9601(22). Thus, under 42 U.S.C. § 9607(a)-(4)(B), the USAF is liable for a portion of "any other necessary costs of response incurred by any other person consistent with the national contingency plan." **Key Tronic's motion for partial summary judgment that the USAF is liable under 42 U.S.C. § 9607 should be granted.**

(ii) Exposure

As discussed above, the USAF is not liable for any portion of the $4.2 million Key Tronic is obligated to pay under the terms of the Consent Decree. Therefore, the question presented here is whether Key Tronic is entitled to partial summary judgment establishing the amount of its private cost recovery claim at $1,271,511.10.

In order to prevail on this issue, Key Tronic must prove by undisputed facts that its claimed costs were (1) "necessary" and (2) "consistent with the national

contingency plan." *City of Philadelphia v. Stepan Chemical*, 713 F. Supp. 1484, 1490 (E.D. Pa. 1989). Necessity and consistency are questions of fact. *Cadillac-Fairview/California v. Dow Chemical*, 840 F.2d 691, 695 (9th Cir. 1988).

Key Tronic's response cost claim is disputed on several grounds. Defendants assail the propriety under CERCLA of several categories of costs claimed, the legitimacy of the claims made here even if the type of cost is not *per se* improper, and the amounts of various cost claims. More importantly, both the USAF and Alumax argue that they have been provided no discovery regarding Key Tronic's response cost claim. The discovery cut-off date in this action is December 31, 1990. Defendants should have an opportunity to examine the nature and amount of the costs claimed. Therefore, **Key Tronic's motion for partial summary judgment establishing the amount of its private cost recovery claim should be denied without prejudice to renew after reasonable discovery.**

B. Alumax

(i) Liability

Key Tronic alleges that Alumax disposed of liquid chemical wastes, including TCA and TCE, at Colbert between 1972 and 1980. (Plaintiff's Statement of Facts, ¶ 3.) Key Tronic supports this allegation with the testimony of two former Alumax employees, Russell Parish and Vernon Peters. Key Tronic asserts that Parish and Peters have testified that they personally took hazardous waste to Colbert. (*See* Ex. 5 & 6 to Plaintiff's Statement of Facts.) Thus, Key Tronic argues that it has established Alumax's liability under State and Federal law.

Alumax disputes plaintiff's allegation by presenting the declaration of Les Wright, the foreman of Alumax's "plating shop." Wright's declaration details how he operated a

"degreasing vat." When the vat was full of waste, Wright would have it cleaned, and the waste would be disposed of. Wright declares: "During the eleven years that I worked for Alumax, *as far as I know*, all of the waste from the vapor degreaser was taken to the Mica Landfill. I know of none going to the Colbert Landfill." (Wright Decl., p. 3.)

The Court notes that Wright's testimony is not an affirmative declaration that "I know that none of the vapor degreaser waste was taken to the Colbert Landfill." However, as Alumax points out, Parish's testimony may be impeachable, and Peters's testimony is equivocal ("I believe" I hauled chemicals to Colbert "once or twice, but I'm not for sure.") In light of the fact that Key Tronic bears the burden of proof on this issue, summary judgment is not appropriate. Therefore, **Key Tronic's motion for partial summary judgment that Alumax is liable should be denied.**

VII. *Discovery Motions*

The USAF moved for a protective order pending disposition of its motion to dismiss discussed above. Key Tronic countered with a motion to compel the USAF to answer the discovery.

The USAF's memoranda on the discovery issue merely offer excuses for its failure to respond on time (counsel was sick, substitute counsel was unaware of the outstanding discovery, etc.) The substantive propriety of the discovery is not contested.

Key Tronic's motion to compel should be **GRANTED**, and the USAF's motion for a protective order should be **DENIED**. Because the USAF has had the outstanding discovery requests for over 7 months, the court orally ordered it to respond thereto by August 9, 1990.

The court finds no substantial justification for the USAF's failure to provide discovery. Therefore, Key Tronic

is awarded the reasonable costs and attorneys' fees of its motion to compel. Key Tronic may file a statement of its costs and fees on the motion. The USAF shall have 10 days from receipt thereof to respond to or oppose the amount claimed. The court will then determine a reasonable amount.

Based upon the foregoing, **IT IS HEREBY ORDERED**:

1. Plaintiff's Second, Third and Fourth Claims for Relief are **DISMISSED WITH PREJUDICE** against defendants United States, the Air Force and Rice. The First Claim for Relief is **DISMISSED WITH PREJUDICE** against these defendants with respect to any costs or obligation incurred by plaintiff pursuant to the Consent Decree entered in *DOE and EPA v. County of Spokane and Key Tronic Corp.*, C-89-033-RJM (E.D. WA, Jan. 9, 1989). These defendants' motion to dismiss the First Claim for Relief is **DENIED** with respect to plaintiff's action to recover private response costs under 42 U.S.C. § 9607.

2. The Complaint and all Claims therein against defendant William Schmidt are **DISMISSED WITH PREJUDICE.**

3. Key Tronic's motion for partial summary judgment is **GRANTED IN PART** and **DENIED IN PART.** The Court grants summary judgment establishing the liability of the Air Force under 42 U.S.C. § 9607. In all other respects, Key Tronic's motion for partial summary judgment is **DENIED**.

4. Key Tronic's motion to compel discovery from the Air Force is **GRANTED**; the Air Force's motion for a protective order is **DENIED**.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

DATED this 9th day of August, 1990.

/s/_____
JUSTIN L. QUACKENBUSH
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
WASHINGTON

KEY TRONIC CORPORATION, a Washington corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA; THE UNITED STATES AIR FORCE; DONALD B. RICE, THE SECRETARY OF THE UNITED STATES AIR FORCE, in his individual capacity; ALUMAX, INC., a Delaware corporation; ALUMAX FABRICATED PRODUCTS, INC., a Delaware corporation,

Defendants.

NO. C-89-694-JLQ

SUPPLEMENTAL AFFIDAVIT OF DAVID L. POWERS

STATE OF WASHINGTON)
) ss.
COUNTY OF SPOKANE)

DAVID L. POWERS, being first duly sworn upon oath, deposes and says:

1. This Affidavit supplements the affidavit I executed in June 1990 ("June Affidavit") in support of Key Tronic's previous Motion For Partial Summary Judgment ("June Motion"). A copy of the June Affidavit is attached as Exhibit P.

2. Attached as Exhibit A is a summary of the costs that Key Tronic has incurred or will incur in connection with the Colbert Landfill for which it seeks summary judgment.

3. In my June Affidavit I described the efforts undertaken by Key Tronic and its attorneys, consultants and investigator to: 1) identify other Potentially Responsible Parties; and 2) develop and shape the final remedy for Colbert. I also identified the costs Key Tronic had incurred related to these efforts. The identification of costs was based on my review of the supporting cost documentation which the company has maintained.

4. Subsequent to the June Motion, Key Tronic was asked by Alumax to produce all of its cost documentation supporting its response cost claims. I authorized the production of these documents and had them sent to Key Tronic's counsel, Perkins Coie.

5. The cost documents were further reviewed by Perkins Coie prior to production. Portions of the documents reflecting fees and expenses paid to Popham, Haik were redacted by Perkins Coie, and certain of the documents reflecting the fees and expenses paid to Goss, Moe & Sampson were not produced. This was done so that the produced documents and costs identified in the documents include only those costs unquestionably linked to the PRP and Consent Decree efforts. This review and redaction process resulted in a net reduction in the amount of costs sought to be recovered in this motion.

6. Prior to the preparation of my June Affidavit and the conduct of my deposition, I had reviewed the cost documentation on which I relied to prepare the June Affidavit. After my deposition and in preparation for this affidavit, I reviewed the documents that Perkins Coie had redacted and produced. Based on this review, I believe that the costs identified in the produced and redacted documents are the lowest conceivable amount of costs attributable to the

PRP and Consent Decree efforts. I continue to believe that the figures set forth in my June Affidavit are accurate and properly attributable to the PRP and Consent Decree work, but the lower figures were selected for this motion to ensure that there would be no issue of fact to preclude summary judgment. In other words, costs sought in the instant motion are the result of a much more conservative approach of identifying costs attributable to the PRP and Consent Decree efforts than was used for my June Affidavit.

7. For purposes of this motion, Key Tronic seeks to recover $47,126.12 in fees and expenses for the work performed by Popham Haik relating to the PRP search. In my June Affidavit, Popham Haik costs for the PRP effort were identified as $121,589.36. While $121,589.36 is the amount of costs actually incurred by Key Tronic for Popham Haik's work relating to the PRP effort, we have, for purposes of this motion, reduced the figure to $47,126.12. This figure includes only those costs which are specifically, directly and unquestionably linked to the PRP effort. The Popham Haik redacted documents which have been produced identify those PRP costs for which we seek reimbursement. The costs sought are based on the amount of attorney and legal assistant time worked on the PRP matter, multiplied by the hourly billing rate of the individual concerned.

Attached as Exhibit B to this affidavit is a summary of the fees and expenses sought to be recovered for each Popham Haik invoice. Attached as Exhibit C are the Popham Haik invoices and Key Tronic payment records on which the summary is based.

8. Here is one example of why the figure for Popham Haik has been reduced. In my June Affidavit, I included Popham Haik fees and expenses associated with the preparation of a complaint for contribution. In my view, the preparation of the complaint was a necessary step so that Key Tronic could conduct formal discovery against certain PRPs. The revised figure excludes Popham Haik fees and expenses

associated with the complaint. This was done to preclude any argument that the complaint fees were not recoverable because the complaint may have served purposes other than the PRP search. I still believe that such fees are properly recoverable as PRP search costs, but have not sought such fees in this motion.

9. I am of the view that all of Popham Haik's work contributed at least indirectly to identification of PRPs. They, along with Goss, Moe & Sampson, did the first investigation of PRPs at the Colbert site, identified entities that were likely to have taken chemical wastes to Colbert, filed complaints in state and federal court against those entities (including Alumax and the Air Force), and engaged in substantial investigation and discovery regarding whether and in what amounts chemical costs were taken by those entities to Colbert. Arguably, all of the legal research and drafting associated with that effort contributes to PRP identification. Nevertheless, it is possible to take a more narrow view of the PRP investigative effort and include only those costs directly associated with investigation, discovery, and document analysis. For purposes of this motion, we are seeking only reimbursement of costs specifically and directly related to such efforts.

10. Key Tronic seeks summary judgment with respect to $5,215.48 in fees and expenses for the work performed by Goss, Moe & Sampson relating to the PRP search. In my June Affidavit, the Goss, Moe costs for the PRP search were identified as $9,464.52. While $9,464.52 is the amount of costs actually incurred by Key Tronic for Goss, Moe's work related to the PRP search, we have, for purposes of this motion, reduced the figure to $5,215.48. Again, this figure includes only those costs which are specifically and directly linked to the PRP effort. This reflects the same conservative approach that was taken with respect to the Popham Haik costs discussed in paragraphs 6 through 9 above. It is based on the amount of attorney and paralegal time worked on the

PRP matter, multiplied by the hourly billing rate of the individual concerned.

Goss, Moe documents were not redacted, but only those invoices which referenced services unquestionably related to the PRP effort were produced. Even the figures on the produced invoices were sometimes reduced. For example, the July 29, 1986 invoice had billed Key Tronic for fees of $3,086.25 and expenses of $555.26. The amount sought in this motion for that invoice is only $1,000 in fees and $0 in expenses. This was done because certain of the entries on the invoice do not explicitly reference PRP work. The reduction to $1,000 is the lowest possible amount attributable to PRP work. A similar reduction and analysis were used for the August 25, 1986 invoice.

The amounts sought for each of the produced Goss, Moe invoices are identified in the documents produced. Attached as Exhibit D is a summary of the fees and expenses sought to be recovered for each Goss, Moe invoice. Attached as Exhibit E are the Goss, Moe invoices and Key Tronic payment records on which the summary is based.

11. For purposes of this motion, Key Tronic seeks to recover $62,492.18 in fees and expenses relating to Perkins Coie's PRP search, and $160,641.23 in fees and expenses relating to Perkins Coie's efforts in negotiating the Consent Decree. These are the same figures that were identified in the June Affidavit. The figures are based on the amount of attorney or paralegal time worked on PRP or Consent Decree matters, multiplied by the hourly billing rate of the individual concerned.

Each produced invoice identifies the amount of fees and expenses sought for that invoice. Attached as Exhibit F is a summary of the fees and expenses sought to be recovered for each invoice. Attached as Exhibit G are the supporting Perkins Coie invoices on which the summary is based.

The identification of the Perkins Coie costs was conducted using the same conservative approach that was used for the Popham Haik costs described above. The redaction and production were done by Perkins Coie. Based on my review of the redacted and produced documents, I agree with the conservative approach taken and believe that the amounts sought are the lowest possible amounts attributable to the PRP and Consent Decree efforts.

12. For purposes of this motion, Key Tronic seeks to recover $2,512.24 in fees and expenses for the PRP work performed by Robert Bailor, an investigator. In my June Affidavit, the Bailor costs were identified as $2,462.21. The current figure reflects the total of the charges to Key Tronic as set forth on all of the Bailor invoices that were produced. The invoices reference the amounts chargeable to Key Tronic and the County and the fact that Key Tronic, in most instances, paid one-half of the invoiced amounts. On one occasion, Key Tronic paid the entire amount. The change from $2,462.21 to $2,512.24 resulted from an inadvertent failure to include one of the Bailor invoices in the June total.

Attached as Exhibit H is a summary of the invoices which total $2,512.24. Attached as Exhibit I are the Bailor invoices and Key Tronic payment records on which the summary is based.

13. For purposes of this motion, Key Tronic seeks to recover $129,447.31 in fees and expenses for the work performed by Landau Associates, Inc. relating to the negotiation of the Consent Decree and Scope of Work. In my June Affidavit, the Landau costs were identified as $126,270.53. Additional review of the documents has resulted in a higher figure.

The figure of $129,447.31 was arrived at as follows. The Landau invoices for Colbert which were produced total $133,139.08. However, Key Tronic is following the same conservative approach with respect to the Landau costs as it

has with respect to other costs. We are not now seeking recovery for two pieces of work performed by Landau which related indirectly to the Consent Decree. Subtracting the cost for those pieces of work from $133,139.08 amounts to $129,447.31.

Attached as Exhibit J is a summary of the Landau Associates, Inc. invoices which total $129,447.31. Attached as Exhibit K are the supporting Landau Associates, Inc. invoices and Key Tronic payment records on which the summary is based.

14. For purposes of this motion, Key Tronic seeks to recover $20,903.35 in fees and expenses for the work performed by Dames & Moore. In my June Affidavit, the Dames & Moore costs were identified as $22,323.09. Additional review of the documents has resulted in a lower figure.

The figure of $20,093.35 was arrived at as follows. The total amount of fees and expenses identified in the Dames & Moore produced invoices was $41,164.69, of which Key Tronic paid $21,297.75. Key Tronic received a credit from Dames & Moore of $394.40 because it had paid too much for one invoice. Subtracting the $394.40 credit from Key Tronic's payments of $21,271.75 amounts to $20,903.35. This is the amount that Key Tronic seeks to recover for the work performed by Dames & Moore.

In my deposition, I could not recall the nature of the work performed by Dames & Moore or the sequence of events leading up to our hiring of Dames & Moore. I have since reviewed the Dames & Moore documents and have refreshed my recollection. My refreshed recollection is as follows. Dames & Moore reviewed the Remedial Investigation, the Feasibility Study and the reports prepared by Maddox and Donahue which were issued prior to the Remedial Investigation and Feasibility Study. Dames & Moore analyzed the various remedial alternatives proposed in

the Remedial Investigation and Feasibility Study to determine whether the reports included the most cost-effective remedy. Dames & Moore further analyzed each alternative set forth in the RI/FS to determine whether the cost projections for each such alternative were accurate. After this work was performed, Dames & Moore then assisted Key Tronic in preparing comments to the United States and State of Washington on the RI/FS. Those comments recommended that the United States and State of Washington select the most cost-effective remedy. The United States and State of Washington ultimately selected this remedy.

Attached as Exhibit L is a summary of the Dames & Moore invoices which indicate the amounts billed and amounts paid. Attached as Exhibit M are the Dames & Moore invoices and Key Tronic payment records on which the summary is based.

15. Key Tronic is obligated to pay $4.2 million pursuant to the Consent Decree with the United States Environmental Protection Agency, Washington Department of Ecology and Spokane County. In my June Affidavit, I said that Key Tronic had paid $1.3 million pursuant to the Consent Decree. Key Tronic has now paid $2.25 million pursuant to the Consent Decree. Attached as Exhibit N is a summary of the documents reflecting the payment of $2.25 million. Attached as Exhibit O are the documents on which the summary is based.

/s/
DAVID L. POWERS

SUBSCRIBED AND SWORN to before me this 1st day of February, 1991.

Betty A. Traband /s/
NOTARY PUBLIC in and for the State of Washington, residing at Spokane.
My Commission Expires: March 15, 1994.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

KEY TRONIC CORPORATION, a Washington corporation, Plaintiff, v. UNITED STATES OF AMERICA; THE UNITED STATES AIR FORCE; DONALD B. RICE, THE SECRETARY OF THE UNITED STATES AIR FORCE, in his official capacity; ALUMAX, INC., a Delaware corporation; ALUMAX FABRICATED PRODUCTS, INC., a Delaware corporation; and ALUMAX MILL PRODUCTS, INC., a Delaware corporation, Defendants.	CIVIL No. C-89-694-JLQ STIPULATION

WHEREAS, Key Tronic Corporation ("Key Tronic") has filed this action, pursuant to sections 107(a) and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9607(a) and 9613, against several defendants, including the United States, the United States Air Force, and Donald Rice, Secretary of the Air Force (hereinafter referred to jointly as "the United States") seeking to recover removal and interim remediation costs Key Tronic alleges to have incurred in connection with the remediation of the release of hazardous substances at Colbert Landfill, Spokane, Washington;

WHEREAS, the United States and Key Tronic previously executed the Consent Decree entered by this Court on January 11, 1991, in order to resolve the United States' liability to Key Tronic for certain of the claims Key Tronic has asserted;

WHEREAS, the Paragraph 3 of the Consent Decree provided that the following claims ("the excepted claims") remained in dispute between the parties:

A. Costs and fees incurred by attorneys and investigators for Key Tronic during Key Tronic's search for additional potentially responsible parties and costs and fees incurred by attorneys related to the negotiation of the Consent Decree between Key Tronic, the United States, and the State of Washington in *The State of Washington v. County of Spokane*, Civ. No. 89-033-RJM;

B. The salary of David Powers, Key Tronic's General Counsel and Secretary, in the amount of $70,000, for time spent supervising the search for additional potentially responsible parties and negotiating the Consent Decree identified in A;

C. Attorneys' fees and costs incurred by Key Tronic in the prosecution of this action; and

D. Prejudgment interest on excepted claims.

WHEREAS, on March 19, 1991, the Court issued a decision holding that Key Tronic is entitled to recover on the excepted claims as a matter of law;

WHEREAS, the United States and Key Tronic have entered into this Stipulation to further narrow the issues in this litigation;

NOW, THEREFORE, it is agreed and stipulated that:

1. The Court shall enter judgment on the excepted claims in the amount of $155,500.

2. This agreement extends to the quantum of recovery alone; the United States preserves all rights to appeal an adverse judgment with respect to the issue of whether any or all of the excepted claims are recoverable as a matter of law.

3. Key Tronic reserves the right to seek to recover attorneys' fees incurred after June 17, 1991, and interest on the excepted claims accrued after June 17, 1991, should the United States appeal this matter.

4. Nothing in this agreement shall affect the rights or obligations of the United States or Key Tronic established in the Consent Decree with respect to any issue other than the quantum of recovery to be awarded on the specified excepted claims in paragraph 1 above.

SO AGREED:

RICHARD B. STEWART
Assistant Attorney General

/s/_____
EILEEN T. MCDONOUGH
Environmental Defense Section
U.S. Department of Justice
10th St. & Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202) 514-3126

Counsel for United States

DATED: June 17, 1991

/s/_____
JAMES R. MOORE
Perkins Coie
1201 Third Avenue
40th Floor
Seattle, Washington 98101
(206) 583-8888

Counsel for Key Tronic

DATED: June 19, 1991

No. 93-376

In the

Supreme Court of the United States

KEY TRONIC CORPORATION,
Petitioner,
v.
UNITED STATES, et al.

and

STANTON ROAD ASSOCIATES.
Petitioner,
v.
LOHREY ENTERPRISES, INC., ET AL.

ORDER ALLOWING CERTIORARI
Filed December 13, 1993.

The petition herein for writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

December 13, 1993